



**Thumbi v Karioki (Civil Case E383 of 2024) [2025] KEHC 6569 (KLR)
(Commercial and Tax) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6569 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E383 OF 2024
F GIKONYO, J
MAY 15, 2025**

BETWEEN

MUIGAI PHARES THUMBI PLAINTIFF

AND

WINNIE ELIZABETH WANJIRU KARIOKI DEFENDANT

RULING

1. Before me is the defendant's notice of motion dated 26th August 2024, expressed to be brought under Sections 5, 6, 1A, 1B, 3A of the *Civil Procedure Act*, Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules. She seeks an order to strike out the plaintiff's suit as it is sub judice, scandalous, vexatious, frivolous, and abuse of the court process and violates Order 4 Rule 1(1)(f) of the Civil Procedure Rules.
2. The application is based on the grounds on the application, the annexed affidavit sworn by the defendant on 26th August 2024 and espoused in the written submissions dated 16th January 2025.
3. The defendant's case is that Kiambu High Court Commercial Suit No. E015 of 2023: Winnie Elizabeth Wanjiru Karioki v Muigai Phares Thumbi (Kiambu case) which is between the parties, over the same subject matter and the same issues is pending before the Kiambu High Court.

Response

4. In opposing the application, the plaintiff filed a replying affidavit sworn on 20th December 2024 and written submissions dated 13th February 2025. His position is that the present suit is seeking recovery of loan arrears which is distinct from the Kiambu case by the defendant seeking a permanent injunction to restrain him from trespassing, alienating or dealing with the property.



5. He asserted that the present suit seeks repayment of Kshs. 75,450,000/- arising from a loan agreement executed between him and the defendant on 21st June 2023. He also proffered that the original title for L.R No. 4885/85 (I.R 95167) had been deposited as security thereof. He stated that he instituted this matter in this court as the subject loan agreement was executed and witnessed in Nairobi.

Submissions

6. The defendant submitted that the suit is sub judice. She highlighted that in the Kiambu case, she has also sought a declaration that the loan agreement dated 21st June 2023 stands rescinded and/or vitiated by the defendant's breach. She also sought in the alternative, a declaration that the Loan Agreement dated 21st June 2023 is illegal, unconscionable, unfair and fraudulent hence unenforceable. She contended that this suit seeks to enforce the same loan agreement.
7. The defendant therefore asserted that the two suits touch on the same subject matter and that there is possibility of conflicting decisions being issued over the same subject matter. She added that there is no contest as to the competence of the Kiambu High Court to entertain the suit filed by the Applicant herein.
8. The defendant thus submitted that the application meets the four tests laid by the Supreme Court to establish that a matter is sub judice. She relied on section 6 of the *Civil Procedure Act*, Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR and Kenya National Commission on Human Rights v Attorney General; *Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017)* [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling).
9. The defendant contended that the omission of an averment required under Order 4 Rule 1(1) (f) of the Civil Procedure Rules was deliberate and is fatal. She thus urged the court to strike out this suit. She relied on Joseph v Mbatha & 3 others (Environment & Land Case E037 of 2021) [2024] KEELC 3347 (KLR) (23 April 2024) (Ruling) and Lesalon v Koiyo & 3 others (Environment & Land Case 91 of 2017) [2022] KEELC 3097 (KLR) (29 June 2022) (Judgment), where the court struck out a suit because it violated the provision.
10. On his part, the plaintiff submitted that the instant application is not merited as it does not meet the threshold in Section 5 and 6 of the *Civil Procedure Act* because this suit deals with a different subject matter from the Kiambu case.
11. The plaintiff also submitted that this suit raises serious triable issues revolving around breach of contract and non-payment of loan arrears. Therefore, he argued that it should not be struck out as this would deny him his right to be heard. He relied on Article 50 of *the Constitution* and the rules of natural justice. He also relied on Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR and D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR)
12. In conclusion, the plaintiff urged the court to find that the defendant's application has no merit and dismiss it with costs.



Analysis and Determination

Sub judice

13. The doctrine of sub judice has been cited as a basis for striking out this suit. Sub judice is underpinned in section 6 of the [Civil Procedure Act](#) which provides that: -

“6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

14. The doctrine of res sub judice precludes multiplicity of suits. Unlike res judicata (s.7 of the [Civil Procedure Act](#)), sub judice is in relation to two or more proceedings or suits which are pending before a court of competent jurisdiction but which are on similar issues, same subject matter or parties including those litigating under same title or representative capacity.

15. See the Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR, where it observed as follows:-

“(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.

A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.” (Emphasis added)

16. The defendant exhibited the plaint in the Kiambu case which confirms that the loan agreement dated 21st June 2023 forms the subject matter of the suit. It also confirms that the Plaintiff has sought a declaration that the loan agreement dated 21st June 2023 stands rescinded and/ or vitiated by the defendant’s breach. She also sought in the alternative, a declaration that the Loan Agreement dated 21st June 2023 is illegal, unconscionable, unfair and fraudulent hence unenforceable. Therefore, there is a nexus between the two suits.

17. Be that as it may, the plaintiff claims that he is entitled to a remedy on repayment of the debt. Ordinarily, such claim may be made by way of a counter-claim in the existing suit serving as a cross-suit, so as



to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim. In the opinion of the court this suit may be conveniently disposed of in the pending suit at Kiambu. This formulation forms the functional foundation for resolving the application before the court.

Scandalous, frivolous, vexatious

18. The defendant argued that the suit is scandalous, frivolous and vexatious. A pleading is scandalous where it makes an imputation on the character when character is not in issue; it is frivolous if it lacks seriousness and vexatious if it annoys or tends to annoy. *Mpaka Road Development Co. Ltd v Abdul Gafur Kana T/A Anil Kapuri Pan Coffee House* [2001] eKLR
19. From the pleadings and argument presented, I find not any merit in the defendant's claim that the plaintiff's suit is scandalous, frivolous and vexatious.

Abuse of the court process

20. The defendant further argued that the plaintiff's suit is an abuse of the court process. Abuse of the court process is the improper use of the judicial process in litigation. Multiplicity of actions on the same subject matter, against the same opponent, on the same issues, is an abuse of process of court. *Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others* [2018] KEHC 6100 (KLR)
21. The averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint, is intended to serve the doctrines of *res judicata* and *sub judice*. Order 4 Rule 1(1)(f) of the Civil Procedure Rules, section 6 and 7 of the [Civil Procedure Act](#).
22. The plaintiff did not provide an averment in his verifying affidavit in accordance with Order 4 Rule 1(1)(f) of the Civil Procedure Rules.

Striking out

23. The 1st defendant sought the striking out of the plaintiff's suit. Order 2 Rule 15(1) (d) of the Civil Procedure Rules provides that the court may:

At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-

- (d) It is otherwise an abuse of the process of the Court and may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as the case may be."

24. The plaintiff correctly submitted that, striking out of pleadings is a drastic measure, and should be exercised sparingly and in a clear case. *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [supra]
25. However, the court must seek a proportioned balance between, the risk of driving a litigant out of the seat of justice without a hearing, and dragging a person to a proceeding which ought not to have been filed in the first place. Taking one side absolutely without reference to the other side is unjust and most unfair. *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR

Conclusions and orders

26. It is not always that, a suit that is sub judice should be struck out. In ordinary circumstances, the law presumes that a suit which is sub judice, should be stayed or consolidated with the one earlier in time.



27. I have not been shown the defence filed in the case in Kiambu. However, I have stated that, the claim for non-payment of loan repayment may have been made as a counter-claim in the suit filed in Kiambu. Nevertheless, to avert any prejudice, and in fairness and justice, this suit is transferred to Kiambu where the two may be heard together or consolidated. This course of action carries a lower risk of injustice to any party and is compatible to the right to be heard. Art.50 of *the Constitution*.
28. In conclusion, the defendant's application dated 26th August 2024 is disposed of as follows: -
- a. This suit shall be transferred to Kiambu High Court for hearing and disposal upon such course and terms say, being heard together or consolidated with the Kiambu case.
 - b. No order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 15TH DAY OF MAY, 2025

F. GIKONYO M

JUDGE

In the presence of: -

1. Orege for defendant present
2. Ms. Nasambu for Ms. Kamau for plaintiff/Respondent
3. CA Kinyua

